

Time At A Premium: The Arbitration of Overtime and Premium Pay Disputes

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I. INTRODUCTION

Parties to a bargaining relationship attempt to order their workplace by negotiating a collective agreement, a form of contract that establishes the terms of the employment bargain and allocates decisionmaking power between labor and management. Inevitably, disputes arise during the term of the collective agreement: an employee is discharged for misconduct at work; another employee receives no vacation pay because the company claims he failed to fulfill the work eligibility requirement set forth in the contract;¹ management decides to subcontract a major maintenance function instead of assigning that work to regular employees.² Labor and management know that the grievance procedure will not be able to resolve every such controversy. For this reason, virtually all collective agreements establish an arbitration mechanism providing for the private, final, and binding resolution of grievance disputes.

A body of established principles guides the arbitrator in interpreting and applying the parties' agreement. This common law of the labor agreement can be analyzed systematically. Disputes over the interpretation and application of overtime and premium pay provisions are among the typical issues brought to arbitration and resolved by application of the arbitral common law. This Article will explore the ways in which arbitrators deal with these types of disputes.

Most collective bargaining agreements include provisions for premium pay for certain work. For example, contracts generally provide for overtime pay at one-and-one-half times an employee's regular rate for hours worked in excess of eight hours a day or forty hours a week. Parties also negotiate premium-pay clauses covering work performed on a holiday, weekend, or scheduled day off, or on the sixth or seventh

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1. See Abrams & Nolan, *The Common Law of the Labor Agreement: Vacations*, 5 INDUS. REL. L.J. 603 (1983).

2. See Abrams & Nolan, *Subcontracting Disputes in Labor Arbitration: Productive Efficiency Versus Job Security*, 15 U. TOL. L. REV. 7 (1983).

work day in a week. Pay increments often are provided for night shift work and for unusually unpleasant or hazardous work.³

As Arbitrator Samuel Krimsly explained in *Kopper Co., Inc.*,⁴ "premium pay" is a generic term used to describe two different types of situations in which labor and management have determined that a higher than regular rate of pay is warranted.

Some premiums such as shift differentials are given to compensate employees for the onerous nature of the duty involved. Thus, it is considered more onerous to work late at night and straight time pay is . . . increased. The increase has no relation to the quantity of work but the quality of condition under which the work is performed.

Overtime, on the other hand, deals with the quantity of hours. Granted it is onerous to work longer hours, but the premium is paid for extending the working time, not the onerous nature of the work or the general working conditions.⁵

Thus parties include overtime and premium pay provisions in their agreement in part to compensate employees at enhanced rates of pay for work performed outside of and in addition to their normal work period. Employees anticipate that a certain period of leisure time will surround their normal shifts of work and that weekends and holidays will be free from work responsibilities.⁶ Under premium pay provisions, management "purchases" these leisure hours at a higher unit cost.⁷ Premium pay provisions act as a disincentive to scheduling employees outside their normal work period.⁸ This, in turn, may induce greater employment by encouraging management to hire more workers to perform the needed work at regular rates of pay.⁹

Management may use enhanced levels of compensation to encourage employees to accept extra work opportunities or less desirable assignments when acceptance is voluntary under the collective agreement. Faced with the choice between hiring and training additional employees or paying current employees at premium rates, management may opt for use of premium pay, especially if the pool of available and qualified new hires is small and company staffing needs are variable.¹⁰

Some employees view premium pay work opportunities as a blessing; others see them as a curse.¹¹ While overtime may be a welcome source of additional earnings,

3. In its survey of major collective bargaining agreements, the Bureau of National Affairs reported in 1983 that 96% of the clauses specifying the premium rate require premium pay after eight hours. Of those provisions, 99% set the rate at time and one-half. Sixty-nine percent of the sample contained weekly overtime pay provisions. Sixth day premiums were found in 23% of the sample, seventh day premiums in 25% of the sample, and Saturday and Sunday premiums in 51% and 68% of the sample respectively. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 57:1-4. Shift premiums were included in 83% of the BNA sample and hazardous work premiums in 6% of the sample. *Id.* at 93:3, 6.

4. 61 Lab. Arb. (BNA) 600 (1973).

5. *Id.* at 603.

6. Economy Steel Constr. Co., 47 Lab. Arb. (BNA) 861, 863 (1966) (Updegraff, Arb.) ("It is widely and clearly the desire of most working men today to avoid working on Saturdays and Sundays. Men in our state of civilization appear to prefer their weekends to be available for their own personal affairs.").

7. New York Shipping Ass'n, 20 Lab. Arb. (BNA) 75, 86 (1952) (Hays, Arb.).

8. Ford Motor Co., 11 Lab. Arb. (BNA) 1158, 1160 (1948) (Shulman, Arb.); John Deere Tractor Co., 3 Lab. Arb. (BNA) 737, 741 (1946) (Updegraff, Arb.) (overtime rates discourage the scheduling of long hours).

9. City of San Jose, Cal., 76 Lab. Arb. (BNA) 732, 734 (1981) (Concepcion, Arb.); Economy Steel Constr. Co., 47 Lab. Arb. (BNA) 861, 863 (1966) (Updegraff, Arb.).

10. *E.g.*, General Elec. Co., 31 Lab. Arb. (BNA) 403, 412 (1958) (Healy, Arb.).

11. Compare Walworth Co., 5 Lab. Arb. (BNA) 551, 552 (1946) (Selekman, Arb.) (overtime is "a valued opportunity for increased take-home earnings") with Logan-Long Co., 61 Lab. Arb. (BNA) 963, 967 (1973) (Dolson, Arb.) (overtime is not "desirable" for all plant employees).

some employees prefer to work their scheduled time and spend their leisure hours as they choose. It is not surprising, therefore, that disputes often arise concerning management's right to require employees to work overtime.¹² Other frequently arbitrated issues include the applicability of overtime¹³ and premium pay¹⁴ provisions, the assignment of overtime,¹⁵ and the equalization of overtime opportunities.¹⁶ In addition to resolving these difficult contractual issues, arbitrators must determine the appropriate remedy for violations of premium pay provisions.¹⁷

II. APPLICABILITY OF OVERTIME PROVISIONS

Most collective bargaining agreements provide for overtime pay, typically set at one-and-one-half times the employees' regular rate, for hours worked beyond eight in a day or forty in a week.¹⁸ It is sometimes doubtful whether the overtime provision applies in a given situation. In general, overtime provisions apply only to work performed beyond the normal length of the workday or workweek. Thus, in *C. O. Porter Machinery Co.*,¹⁹ Arbitrator Harry Platt ruled that the overtime provision was not applicable when the employer unilaterally changed the employees' starting and quitting times, even though the employees left work one hour later than had been their custom.²⁰ The contract required time and one-half only after eight hours per day, but under the new schedule, employees continued to work only eight hours.²¹

In *Hawthorn Melody Farms Dairy*²² the employer argued that the employees were not entitled to the premium rate for work on a scheduled day off because the employees were given the option of not working. Thus they were not "required to work" (the term used in the agreement's overtime provision).²³ Arbitrator Dennis McGilligan rejected this argument and sustained the grievance, relying on evidence that in the past the employer had paid employees at the premium rate in similar situations.²⁴ The decision should be the same even without a past practice. In many situations it may be difficult to distinguish a company request that an employee work overtime from an order to do so, especially when management has the right under the parties' agreement to compel overtime work.²⁵ The applicability of a contractual premium should not turn on whether an employee willingly accepts an overtime opportunity. Although parties can specify the situations in which overtime pay is due, it is difficult to believe the parties would adopt overtime provisions benefiting the

12. See *infra* text accompanying notes 71-103.

13. See *infra* text accompanying notes 18-40.

14. See *infra* text accompanying notes 167-239.

15. See *infra* text accompanying notes 41-70.

16. See *infra* text accompanying notes 114-137.

17. See *infra* text accompanying notes 136-166.

18. See *supra* note 3 and accompanying text.

19. 16 Lab. Arb. (BNA) 379 (1951).

20. *Id.* at 381-82.

21. *Id.* at 381; see also *Hampden Sales Ass'n*, 12 Lab. Arb. (BNA) 62 (1949) (Hill, Arb.).

22. 62 Lab. Arb. (BNA) 1008 (1974) (McGilligan, Arb.).

23. *Id.* at 1010.

24. *Id.* at 1011.

25. *E.g.*, *Vulcan Mold & Iron Co.*, 39 Lab. Arb. (BNA) 292, 296 (1962) (Brecht, Arb.) (right to refuse request to work overtime "approaches in effect the 'free vote' claimed by the typical totalitarian state").

reluctant employee but not the willing or eager employee. If the parties adopted such an agreement, employees would have to feign reluctance in order to benefit from the overtime clause. Neither management nor labor would benefit from this system.

A recurring issue concerning the applicability of the overtime clause is the determination whether the employee has worked more than eight hours in a "day" to qualify for premium pay. When the contract provides a precise definition of the day for overtime measurement, for example, from 7 a.m. to 7 a.m., the arbitrator must follow the parties' direction. If an employee worked the third shift on Wednesday night from 11 p.m. to 7 a.m. and two additional hours on Thursday from 7 a.m. until 9 a.m., but was not scheduled for the Thursday night shift, overtime pay would not be due for the extra work. The employee has not worked more than eight hours within the contractually defined day, 7 a.m. to 7 a.m.

In the absence of a contractual definition of the day for overtime accounting purposes, a consistent prior practice in administering the overtime provision may be an adequate substitute.²⁶ If there is neither an express contractual direction²⁷ nor an established practice, the arbitrator should use the normal meaning of the word "day" as a calendar day and resolve the dispute accordingly.²⁸ Thus, if "day" was not contractually defined in the hypothetical, the employee would be entitled to one hour at the premium rate for having worked from 12 midnight until 9 a.m. within the Thursday calendar day. Disputes about measuring the week when the contract provides for a premium rate for hours worked in excess of forty hours during a week should be resolved in the same fashion. The normal meaning of the word "week" as a calendar week should be used unless the parties have defined the term in their agreement or have established a binding past practice.²⁹

Overtime normally is based on the number of hours actually worked.³⁰ Accordingly, an employee is not entitled to include the day of a paid leave³¹ or other paid but unworked days³² in the workweek for the purpose of computing weekly overtime. On the other hand, arbitrators have interpreted the concept of "work" quite broadly. In *Los Angeles Fire Department*,³³ Arbitrator William Rule addressed a claim brought by fire control aides for overtime based on their assignment as a standby manpower source during the fire season.³⁴ The employer argued that the employees were not "working" because they performed no actual work during this time. The arbitrator

26. Ontario County, 75 Lab. Arb. (BNA) 241, 242-43 (1980) (Van Schaak, Arb.); Pacific N.W. Bell Tel., 71 Lab. Arb. (BNA) 504, 509 (1978) (Harter, Arb.); Sayles Biltmore Bleacheries Inc., 24 Lab. Arb. (BNA) 408, 411 (1955) (Livengood, Arb.).

27. Arctic Utils., Inc., 75 Lab. Arb. (BNA) 653 (1980) (Colbert, Arb.); Mead Paper, 74 Lab. Arb. (BNA) 699, 704 (1980) (Kruger, Arb.) (practice "must give way to the Agreement").

28. May Dep't Stores Co., 77 Lab. Arb. (BNA) 1030 (1981) (Talarico, Arb.); Fabricon Prods., 27 Lab. Arb. (BNA) 221 (1956) (Spaulding, Arb.) (Saturday premium applied to calendar day).

29. King Soopers, Inc., 79 Lab. Arb. (BNA) 857 (1982) (MacLean, Arb.).

30. Murphy Oil Corp., 80 Lab. Arb. (BNA) 1129, 1130 (1983) (Gowan, Arb.) ("[A]s a general proposition most arbitral authority considers hours paid for but not worked as not proper for the computation of overtime except as an agreement may clearly and expressly provide.").

31. E.g., National Linen Serv. Co., 74 Lab. Arb. (BNA) 356 (1980) (Johnston, Arb.) (funeral leave).

32. E.g., Perlman-Rocque Co., 80 Lab. Arb. (BNA) 684, 687 (1983) (Kapsch, Arb.) (holiday); Kerr-McGee Chem. Corp., 70 Lab. Arb. (BNA) 958 (1978) (Russell, Arb.) (holiday).

33. 76 Lab. Arb. (BNA) 572 (1981).

34. *Id.*

concluded that the employees were under their employer's control and discipline while in camp and therefore were at "work" within the meaning of the parties' overtime provision.³⁵ He reasoned by analogy:

Is the watchman who sits all night at his station while listening to a radio and perhaps even watching T.V. not still "working"? Is the maintenance man who stands by to repair a machine which runs perfectly not "working"? Is the receptionist in the lobby with no visitors or phone calls for hours not "working"? Is the firefighter who sleeps soundly in the fire house when no alarm is sounded "working"? All of these people are assigned to be at a particular place for a particular period of time because they may be needed. They are all "working" even though they do nothing physical or mental at the time. There is an object or reason other than recreation or amusement to have them standing by and thus "working" as that term is generally used.³⁶

The same reasoning applies to the related question whether mandatory employee activities outside of normal duties should be counted toward overtime eligibility. In *City of New Brunswick*³⁷ Arbitrator Margaret Chandler ruled that police officers were entitled to overtime pay for the time they spent taking a refresher course conducted by the city:

Participation in a management course is an activity different from those that characterize routine police work. However, most jobs consist of two groups of activities, the regular duties associated with the job and special assignments from one's superior. The mandatory nature of participation in the course definitely qualified this activity as a special assignment, and as such, any overtime involved should be compensated at [overtime] rates. . . .³⁸

Similarly, in *Jacksonville Shipyards*³⁹ Arbitrator J. Earl Williams ruled that the premium pay provision covering time "assigned" encompassed time spent transporting welders to vessels where they worked.⁴⁰

III. ASSIGNMENT OF OVERTIME

Labor and management have conflicting interests in the assignment of work and the availability of overtime opportunities. As explained by Arbitrator Marshall Seidman in *Ashland Chemical Co.*⁴¹:

Generally, management desires flexibility in the assignment of manpower to particular job areas and job duties in order to most efficiently direct the working force. Generally, unions desire rigidity so that manpower is limited to working in particular areas and performing particular tasks in order to require the employer to use additional manpower or to pay premium rates for the use of existing manpower. The parties in negotiations each

35. *Id.* at 575.

36. *Id.* at 574; cf. Milton, *On His Blindness*, THE OXFORD BOOK OF ENGLISH VERSE 352 (A. Quiller-Couch, ed. 1955) ("They also serve who only stand and wait.").

37. 73 Lab. Arb. (BNA) 174 (1979).

38. *Id.* at 176.

39. 76 Lab. Arb. (BNA) 652 (1981).

40. *Id.* at 655; see also *International Harvester Co.*, 22 Lab. Arb. (BNA) 196, 198 (1954) (Cole, Arb.) (hours spent attending grievance meeting counted toward overtime: "If work is to be judged by effort, then who can deny that often an employee works harder at such meetings than while at his routine work assignment.").

41. 63 Lab. Arb. (BNA) 23 (1974).

seek to get the maximum of that quality which they each desire. However, the demands and needs of the other provide constraints upon the ability of either to achieve its wished for ends.⁴²

One common result of this basic conflict of interests is that the parties fail to agree on specific contractual language. Instead, the agreement remains silent on the issue of management's right to assign work on an overtime basis. Other parties do bargain over the allocation of available overtime work, providing, for example, that overtime must be distributed equally.⁴³ The equalization clause may include exceptions, such as overtime assignments of short duration⁴⁴ or of an emergency nature.⁴⁵ Some contracts provide that an employee who begins a job on regular time may complete the task on overtime,⁴⁶ while others require that certain overtime work be assigned to particular classifications or crafts or to employees with the required skills.⁴⁷ As Arbitrator Jeffrey Belkin noted in *Sun Petroleum Products*:⁴⁸

Workers in the skilled trades, particularly those who have gone through any sort of apprenticeship, tend to feel strongly that their particular craft be respected, and that they alone are qualified to perform "their" work. Management, on the other hand, has legitimate objectives of economy and efficiency, and is able to point out that it does not take a journeyman electrician to change a light bulb. . . .⁴⁹

When the union has been able to obtain express protection in the collective agreement for "their" overtime work, the arbitrator must uphold the parties' bargain.⁵⁰ In the absence of a contractual provision restricting the employer in the scheduling of work, however, management retains the discretion to determine *whether* work will be done on an overtime basis and *who* should perform that work. For example, a company need not recall laid-off employees before assigning overtime to other employees unless the contract so requires.⁵¹ Management may be able to subcontract certain work⁵² or use part-time employees⁵³ in lieu of assigning that work to employees on an overtime basis, or may adjust work schedules to reduce the need for overtime assignments.⁵⁴ "[A] requirement that a company must perform work with overtime when it can do it with straight time hours is so severe and unusual that it may not be presumed or inferred in the absence of a clear mandate to that

42. *Id.* at 25.

43. *See infra* text accompanying notes 114-137.

44. *E.g.*, *Diamond Nat'l Corp.*, 61 Lab. Arb. (BNA) 567 (1973) (Gibson, Arb.).

45. *E.g.*, *St. Louis Newspaper Publishers' Ass'n*, 33 Lab. Arb. (BNA) 471 (1959) (Green, Arb.).

46. *E.g.*, *Marble Cliff Quarries Co.*, 38 Lab. Arb. (BNA) 379 (1962) (Dworkin, Arb.).

47. *E.g.*, *Warner Robins Air Logistics Center*, 74 Lab. Arb. (BNA) 217 (1980) (Clarke, Arb.).

48. 70 Lab. Arb. (BNA) 300 (1978).

49. *Id.* at 303.

50. *Id.* at 304; *see also*, *Virginia-Carolina Chem. Corp.*, 42 Lab. Arb. (BNA) 336 (1964) (Volz, Arb.) (overtime work to be assigned to employees within the classification). *But see* *Hughes Aircraft Co.*, 47 Lab. Arb. (BNA) 916, 919 (1966) (Roberts, Arb.) (company failed to assign overtime to qualified employees as required by their contract).

51. *WVA Mining Equip. Co.*, 81 Lab. Arb. (BNA) 479 (1983) (Merrifield, Arb.); *Minnesota Mining & Mfg. Co.*, 73 Lab. Arb. (BNA) 378 (1979) (Stern, Arb.); *Richmond Fireproof Door Co.*, 35 Lab. Arb. (BNA) 682 (1960) (McIntosh, Arb.).

52. *E.g.*, *Continental Can Co.*, 53 Lab. Arb. (BNA) 809 (1969) (Cahn, Arb.); *see generally* *Abrams & Nolan, Subcontracting Disputes in Labor Arbitration*, 15 U. Tol. L. Rev. 7 (1983).

53. *E.g.*, *Associated Wholesale Grocers, Inc.*, 73 Lab. Arb. (BNA) 781 (1979) (Roberts, Arb.).

54. *E.g.*, *Georgia-Pacific Corp.*, 77 Lab. Arb. (BNA) 1156 (1981) (Mewhinney, Arb.); *Olin Mathieson Chem. Corp.*, 24 Lab. Arb. (BNA) 619, 620 (1955) (Warns, Arb.).

effect.”⁵⁵ Management retains the right to determine the number of employees needed for the completion of an overtime assignment⁵⁶ unless the agreement specifies a manning requirement or minimum crew size. Management’s right to determine the duration of the overtime jobs is equally clear.

Occasionally, arbitrators have found that prior practice will bind management in the assignment of overtime even in the absence of contractual restriction. Reasoning in one such case that expected overtime is a valuable benefit and a major condition of employment, Arbitrator Leo Weiss required a company to continue a practice of assigning a rotating crew to work fourth shift hours at overtime rates.⁵⁷ Similarly, Arbitrator Bernard Fieger in *McDowell-Wellman Engineering Co.*⁵⁸ ruled that management was required to follow its prior practice of offering unscheduled second shift overtime to first shift assemblers when it was rejected by second shift assemblers.⁵⁹

Arbitrators’ reliance on prior management practice in making overtime assignments may be misguided. Certainly when the contract language on overtime assignment is clear, a contrary practice should play no role.⁶⁰ In the absence of clear contract language on the issue of overtime assignment, the arbitrator should examine the agreement as a whole to determine the parties’ intent. Contracts generally reserve to management the prerogative to make operational decisions and to schedule and direct the working force. Decisions about whether work will be performed on an overtime basis and by whom it will be performed fall within these management rights.⁶¹ In *Ford Motor Co.*,⁶² Arbitrator Harry Shulman discussed the “practices” that affect fundamental managerial prerogatives:

[T]here are . . . practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.⁶³

In the absence of specific contract language on overtime assignment, the management

55. *Associated Wholesale Grocers, Inc.*, 73 Lab. Arb. (BNA) 781, 789 (1979) (Roberts, Arb.).

56. *Camel Mfg. Co.*, 61 Lab. Arb. (BNA) 1121 (1973) (Ludolf, Arb.); *Gas Serv. Co.*, 43 Lab. Arb. (BNA) 982 (1964) (Klamon, Arb.).

57. *Liquid Air, Inc.*, 73 Lab. Arb. (BNA) 1200 (1979) (Weiss, Arb.).

58. 62 Lab. Arb. (BNA) 794 (1974).

59. *Id.*

60. *United Vintners, Inc.*, 75 Lab. Arb. (BNA) 275 (1980) (Barsamian, Arb.) (company claim of prior practice fails in light of clear contract clause); *see also, e.g.*, *Burger Iron Co.*, 72 Lab. Arb. (BNA) 996 (1979) (Strasshofer, Arb.); *Allied Paper, Inc.* 68 Lab. Arb. (BNA) 1179, 1182 (1977) (Tucker, Arb.); *Wheland Foundry*, 44 Lab. Arb. (BNA) 5 (1965) (Williams, Arb.).

61. *Eagle-Picher Co.*, 45 Lab. Arb. (BNA) 738 (1965) (Anrod, Arb.).

62. 19 Lab. Arb. (BNA) 237 (1952).

63. *Id.* at 241-42.

rights clause must be respected. Management needs flexibility to meet its daily scheduling needs.⁶⁴

Only extraordinarily strong evidence of a tacit amendment by means of a past practice should override the management rights clause. In order to establish a binding commitment through past practice, a union must, at the very least, demonstrate that the parties had consciously explored the issue of the assignment of overtime opportunities and reached some understanding on the matter. It would be sufficient, for example, for the union to show that every time the situation arose and the union expressly raised the issue, management acceded to the union's position.⁶⁵ However, in the absence of such clear evidence of an arrangement or an understanding, the arbitrator should not rely solely on the fact that, in the past, management has assigned overtime in a certain manner. A few examples will illustrate the better approach.

In *Mallinckrodt Chemical Works*⁶⁶ Arbitrator Elmer Hilpert rejected a union claim that a twenty year practice of pre-shift overtime was binding on management. Nothing in the parties' agreement obliged the company to continue requiring employees to report at 7:45 a.m. to change into special clothing for the 8 a.m. shift.⁶⁷ In the same fashion, Arbitrator Jerome Klein, relying on a management rights clause that reserved to the company the prerogative to "direct . . . its working forces,"⁶⁸ ruled that the contract language gave management the exclusive right to determine what work would be performed on an overtime day.⁶⁹ In spite of a prior practice to the contrary, the express management rights clause was overriding and controlling.

The common contractual provision requiring an employer to equalize overtime within a certain classification or grouping of employees should not be read to restrict management's right to assign an overtime opportunity outside of that classification. The purpose of this type of clause is to insure equity among employees within the classification, and not to establish an entitlement to all available overtime work.⁷⁰

IV. MANAGEMENT'S RIGHT TO REQUIRE AND LIMIT OVERTIME

Management's interest in productive efficiency may conflict with an employee's desire to enjoy his off-duty hours. This conflict surfaces in disputes concerning management's power to require employees to work hours beyond their normal schedules. Employees may insist that mandatory overtime is intolerable. For example, the union in *Huron Portland Cement Co.*⁷¹ argued, "[T]o say that [employees] must work overtime anytime the Company wishes them to is putting them in continual bondage with no hours of their own so that they can pursue a regular and normal

64. *Carnegie-Illinois Steel Corp.*, 12 Lab. Arb. (BNA) 810 (1949) (Seward, Arb.).

65. *E.g.*, *Construction Indus. Comm.*, 69 Lab. Arb. (BNA) 14 (1977) (Mansfield, Arb.); *Walworth Co.*, 5 Lab. Arb. (BNA) 551 (1946) (Selekman, Arb.) (all concerned agreed that the prevailing understanding and custom was to assign overtime by seniority).

66. 38 Lab. Arb. (BNA) 267 (1961).

67. *Id.*

68. *E. W. Bliss*, 62 Lab. Arb. (BNA) 266, 269 (1974).

69. *Id.* at 266.

70. *See Consolidated Aluminum Corp.*, 62 Lab. Arb. (BNA) 899 (1974) (High, Arb.); *American Smelting & Refining Co.*, 59 Lab. Arb. (BNA) 340 (1972) (King, Arb.).

71. 9 Lab. Arb. (BNA) 735 (1948) (Platt, Arb.).

life."⁷² In other situations, management may limit the amount of overtime by placing a cap on the number of consecutive hours an employee may work. Grievances arise when employees are denied the opportunity to work additional hours at enhanced rates of pay.

A. Mandatory Overtime

One of the most commonly arbitrated issues involves management's right to demand that an employee work overtime. The issue of mandatory overtime is brought to arbitration when an employer disciplines an employee for refusing an overtime assignment.⁷³ In determining whether management has established just cause for discipline, the arbitrator must decide initially whether management had the right to demand that the employee work the overtime assignment.

In the absence of an express contractual stipulation⁷⁴ or a binding prior understanding,⁷⁵ arbitrators universally rule that management has the right to require employees to work reasonable amounts of overtime.⁷⁶ The mere fact that management had not previously required overtime does not mean that it has surrendered the right to do so.⁷⁷ Employees reasonably should expect that overtime is sometimes necessary and that they must work assignments if ordered to do so.⁷⁸ However, management's prerogative is not unlimited. If an employee offers a reasonable excuse, he should not be disciplined for refusal to work.⁷⁹ Moreover, an employee may refuse to work an overtime assignment if performance of the work would endanger his health or safety.⁸⁰ However, individual employees cannot decide on their own that they have worked long enough and walk off the job.⁸¹

In *Ford Motor Co.*,⁸² Arbitrator Harry Shulman explained that through collective bargaining a union may seek to give the individual employee the option of refusing overtime, but in the absence of contractual reference or an established

72. *Id.* at 740.

73. See, e.g., *BASF Wyandotte Corp.*, 77 Lab. Arb. (BNA) 698 (1981) (Williams, Arb.); *Standard Shade Roller Div.*, 73 Lab. Arb. (BNA) 86 (undated) (Dawson, Arb.); *Vulcan Mold & Iron Co.*, 39 Lab. Arb. (BNA) 292 (1962) (Brecht, Arb.); see also *Bucholz Mortuaries, Inc.*, 69 Lab. Arb. (BNA) 623 (1977) (Roberts, Arb.) (systematic concerted refusal of employees to accept overtime violates the no-strike clause); *United Eng'g & Foundry Co.*, 21 Lab. Arb. (BNA) 145 (1953) (Young, Arb.) (discipline warranted for concerted refusal to work overtime to protest company's handling of other grievances).

74. *West Penn Power Co.*, 27 Lab. Arb. (BNA) 458 (1956) (Begley, Arb.) (contract controls; overtime voluntary).

75. *Pennwalt Corp.*, 77 Lab. Arb. (BNA) 626, 627 (1981) (Erbs, Arb.); *Powermatic/Houdaille, Inc.*, 63 Lab. Arb. (BNA) 1 (1974) (Andrews, Arb.) (practice found not binding).

76. E.g., *Georgetown Steel*, 73 Lab. Arb. (BNA) 233 (1979) (Hall, Arb.) (based on a reading of 166 cases); *Fruehauf Corp.*, 46 Lab. Arb. (BNA) 15 (1966) (Dworkin, Arb.); *Sunbeam Elec. Co.*, 41 Lab. Arb. (BNA) 834 (1963) (Helfeld, Arb.); *Carnegie-Illinois Steel Corp.*, 12 Lab. Arb. (BNA) 810 (1949) (Seward, Arb.).

77. *American Body & Equip. Co.*, 49 Lab. Arb. (BNA) 1172, 1173 (1967) (Bothwell, Arb.); *Shell Oil Co.*, 44 Lab. Arb. (BNA) 1219, 1224 (1965) (Turkus, Arb.).

78. *Allen-Bradley Co.*, 40 Lab. Arb. (BNA) 909 (1963) (Fleming, Arb.).

79. *Pennwalt Corp.*, 77 Lab. Arb. (BNA) 626, 631 (1981) (Erbs, Arb.); *Xidex Corp.*, 73 Lab. Arb. (BNA) 864, 865 (1979) (Bornstein, Arb.); *American Wood Prods. Corp.*, 17 Lab. Arb. (BNA) 419 (1951) (Livengood, Arb.); *John Morrell & Co.*, 17 Lab. Arb. (BNA) 280 (1951) (Gilden, Arb.) (religious belief is not a reasonable excuse).

80. *Pavey Envelope & Tag Corp.*, 78 Lab. Arb. (BNA) 70, 71 (1982) (Cull, Arb.); *Norfolk Shipbuilding & Drydock Corp.*, 74 Lab. Arb. (BNA) 1020 (1980) (Maggiolo, Arb.); *Dodge Mfg. Corp.*, 49 Lab. Arb. (BNA) 429 (1967) (Epstein, Arb.).

81. *Dodge Mfg. Corp.*, 49 Lab. Arb. (BNA) 429 (1967) (Epstein, Arb.).

82. 11 Lab. Arb. (BNA) 1158 (1948).

understanding, management retains the right to determine the number of hours to be worked by employees.⁸³ Even in the absence of an express right to refuse overtime, however, an employee's refusal to work may be justified under certain circumstances:

[W]hen an employee is asked to work overtime, he may not refuse merely because he does not like to work more than eight hours, does not need the extra money, or for no reason at all. But if the overtime work would unduly interfere with plans he made, then his refusal may be justified. If he is given advance notice sufficient to enable him to alter his plans, he must do so. But if the direction is given to him without such notice, then it would be arbitrary to require him to forego plans which he made in justifiable reliance upon his normal work schedule—unless, indeed, his commitments are of such trivial importance as not to deserve consideration. A rule of thumb is not possible. What is required is sympathetic consideration of the individual's situation and make-up.⁸⁴

Management may use its discretion in evaluating excuses, but that discretion must be exercised reasonably. In *Vulcan Mold and Iron Co.*⁸⁵ the employer posted a rule requiring employees to work overtime unless they had "a bona fide special reason satisfactory to the foreman."⁸⁶ Arbitrator Robert P. Brecht concluded that the posted exception to compulsory overtime was not broad enough "to cover the variety of reasons under which an employee *should* be able to escape from a compulsory overtime assignment."⁸⁷ While overtime may be required as a general matter, the employee must be excused if he has a good reason, whether that reason is satisfactory to a particular foreman or not.⁸⁸ As Arbitrator Charles Anrod noted in *Eagle-Picher Co.*,⁸⁹ management must exercise its right "fairly, justly, non-discriminatorily, and with due consideration to the employees' particular or personal circumstances."⁹⁰

In *Pullman Trailmobile*,⁹¹ the employer reprimanded an employee who refused to work one hour overtime. The evidence showed that the employee had a cold and a stiff neck and was weary from having worked ten hours of Saturday overtime. Arbitrator J. Frederik Ekstrom ruled that the employee's request to be relieved from overtime was reasonable and the disciplinary warning was not warranted: "Management . . . must utilize good human relations, not coercion."⁹²

Any contractual prohibition of, or limitation on, mandatory overtime must be respected.⁹³ A clause expressly excusing employees from working overtime if they

83. *Id.* at 1160.

84. *Id.*; see also *County of Cambria, Pa.*, 70 Lab. Arb. (BNA) 625 (1978) (Duff, Arb.) (just cause established for discharge of employee who refused to work overtime in emergency situation because of golf appointment); *Anaconda Co.*, 39 Lab. Arb. (BNA) 698 (1962) (Peck, Arb.) (discharge too severe for employee who had a valid excuse for refusing overtime assignment, but discipline warranted for his insolent and insubordinate response to request to work: "[I can't] make it.").

85. 39 Lab. Arb. (BNA) 292 (1962) (Brecht, Arb.).

86. *Id.* at 297.

87. *Id.*

88. *Id.* at 298; *American Wood Prods. Corp.*, 17 Lab. Arb. (BNA) 419 (1951) (Livengood, Arb.) (employee's prior commitment to work elsewhere was found reasonable).

89. 45 Lab. Arb. (BNA) 738 (1965).

90. *Id.* at 740.

91. 74 Lab. Arb. (BNA) 967 (1980) (Ekstrom, Arb.).

92. *Id.* at 969.

93. *Stanray Corp.*, 48 Lab. Arb. (BNA) 492 (1967) (Sembower, Arb.).

had a "valid excuse" was held to require the employer to provide "reasonable accommodation" for a pregnant employee.⁹⁴ Similarly, a provision requiring management to "take into account . . . the preferences of the employee" when assigning overtime on a non-work day was violated when the company ordered the grievant to work the day she had planned to move.⁹⁵

In *Sargent-Welch Scientific Co.*,⁹⁶ Arbitrator Anthony Sinicropi examined the extent of management's right to schedule overtime in the absence of a contract reference. In that case, the employer had scheduled Saturday overtime work on the day after a holiday and denied holiday pay to employees who failed to report.⁹⁷ The arbitrator denied a grievance seeking holiday pay, noting: "The Company had a history of working overtime and demanding and ordering employees to do so. It had informed new hires of their obligation to work overtime and made acceptance of that request part of their hiring criteria."⁹⁸

In the absence of a contract restriction, management may impose reasonable conditions for an overtime assignment, such as punctuality in reporting for the assignment⁹⁹ or the completion of Saturday overtime work in order to be assigned Sunday overtime work.¹⁰⁰ However, the employer may not use this right to alter a contractually defined normal workweek. Thus in *Central Telephone Co.*¹⁰¹ Arbitrator J. Harvey Daly ruled that management did not have the right to schedule a six day workweek when the contract specifically provided for five "'normal days' tours" as the normal workweek.¹⁰² The arbitrator found the company's claim of a past practice of such scheduling to be unpersuasive.¹⁰³

B. Overtime Ceiling

In the interest of productive efficiency, management may determine that employees should not be assigned more than a predetermined number of hours of overtime work in any twenty-four hour period. Depending upon the nature of the job in question, employee fatigue may increase the risk of accidents or substandard work. A union may contest management's right to limit overtime, arguing that the employees are capable of safe and adequate performance. Here again, contractual terms¹⁰⁴ and prior understandings¹⁰⁵ may resolve the dispute. If management's limi-

94. *Ionia Gen. Tire, Inc.*, 75 Lab. Arb. (BNA) 324 (1980) (Roumell, Arb.); *Anheuser-Busch, Inc.*, 63 Lab. Arb. (BNA) 474 (1974) (Shearer, Arb.) (no "valid" excuse; discharge upheld).

95. *Southwestern Bell*, 61 Lab. Arb. (BNA) 202, (1973) (Wolff, Arb.); *see also Stanray Corp.*, 48 Lab. Arb. (BNA) 492 (1967) (Sembower, Arb.) (contract allowed employee to refuse overtime for personal reasons important to the individual).

96. 54 Lab. Arb. (BNA) 923 (1970).

97. *Id.*

98. *Id.* at 930; *see also Great Lakes Spring Corp.*, 12 Lab. Arb. (BNA) 779 (1949) (Kelliher, Arb.) (holiday pay withheld for failure to report for overtime on day preceding holiday).

99. *New York Tel. Co.*, 68 Lab. Arb. (BNA) 1239 (1977) (Kupsinel, Arb.).

100. *M. S. Churchman Co.*, 62 Lab. Arb. (BNA) 866 (1974) (Lewis, Arb.); *see also McKinney Mfg. Co.*, 26 Lab. Arb. (BNA) 618 (1956) (Duff, Arb.) (reasonable to require employees to work Friday to be entitled to Saturday overtime).

101. 69 Lab. Arb. (BNA) 1133 (1977).

102. *Id.*

103. *Id.* at 1138.

104. *Spaulding Fibre Co.*, 63 Lab. Arb. (BNA) 441 (1974) (Shister, Arb.).

105. *Caterpillar Tractor Co.*, 78 Lab. Arb. (BNA) 241 (1982) (Cohen, Arb.).

tation on overtime conflicts with an express contractual right, the contract, of course, must prevail.¹⁰⁶

In the absence of contractual direction, arbitrators will uphold reasonable ceilings imposed by management, as long as management has shown that the extended hours have a demonstrated impact on employees' ability to perform their assigned tasks or create risks to employee health or safety.¹⁰⁷ For example, in *Airco Speer Carbon-Graphite*,¹⁰⁸ Arbitrator Fred Denson ruled that the company wrongly failed to call the grievant to perform six hours of overtime electrical work to which he was contractually entitled as low man on the overtime roster. The company justified its action on the basis of a policy not to schedule an employee for more than sixteen hours in any twenty-four hour period. The grievant had just completed sixteen hours of work. While the arbitrator recognized that the grievant's "contractual right is subservient to health and safety considerations," the company offered no evidence that the employee was physically or mentally incapable of performing the work.¹⁰⁹ The arbitrator noted "that physical and mental tolerances vary from individual to individual" and management must base its disqualification "on some observed physical or mental deficiency."¹¹⁰ In the absence of such evidence, the arbitrator ruled the company's decision was unreasonable and upheld the grievance.¹¹¹

V. CONTRACTUAL RESTRICTIONS ON THE ASSIGNMENT OF OVERTIME

When parties bargain for express restrictions on the assignment of overtime, management must comply with those contractual requirements even if they result in an inefficient allocation of human resources.¹¹² Contract provisions may require that overtime be offered in guaranteed increments or that overtime work of a particular nature be assigned to employees in a certain department or classification. Contractual provisions setting forth the required procedures for the assignment of overtime can be lengthy and complex and still not resolve all potential disputes.¹¹³

The most common contractual restriction on the assignment of overtime obliges management to equalize overtime opportunities. An equalization provision obviously limits management's flexibility. The purpose of an equalization clause "is to fairly distribute overtime opportunities and the chance to earn premium pay among employees to prevent favoritism."¹¹⁴ At the same time, an equalization provision distributes the burdens of extra work among all the affected employees.¹¹⁵

106. *Airco Speer Carbon-Graphite*, 74 Lab. Arb. (BNA) 1187, 1191 (1980) (Denson, Arb.).

107. See, e.g., *Allegheny Ludlum Steel Corp.*, 62 Lab. Arb. (BNA) 859 (1974) (Porter, Arb.) (no showing made of particular impact or risks).

108. 74 Lab. Arb. (BNA) 1187 (1980).

109. *Id.* at 1190.

110. *Id.* at 1191.

111. *Id.*

112. *Mallinckrodt, Inc.*, 68 Lab. Arb. (BNA) 817, 818 (1977) (Kossoff, Arb.).

113. E.g., *Fruehauf Corp.*, 47 Lab. Arb. (BNA) 421 (1966) (Hayes, Arb.).

114. *County of Cambria, Pa.*, 70 Lab. Arb. (BNA) 625, 628 (1978) (Duff, Arb.); see *John Deere Dubuque Tractor Works*, 35 Lab. Arb. (BNA) 495 (1960) (Larkin, Arb.).

115. *Southern Can Co.*, 68 Lab. Arb. (BNA) 1183, 1189 (1977) (Jedel, Arb.).

Often an equalization clause will contain ambiguous directions, such as the requirement that the company make "every reasonable effort to distribute overtime equally"¹¹⁶ or distribute overtime "as equally as possible."¹¹⁷ In *Mead Corp.*¹¹⁸ Arbitrator Elmer Hilpert interpreted a provision requiring equalization "insofar as practicable." He upheld management's decision to assign two millwrights to work overtime to complete a project that they already had begun, thereby bypassing the grievant, who had less accumulated overtime.¹¹⁹ The condition attached to the equalization clause allowed management to consider various factors in making the assignment, including the relative experience of the employees involved and the grievant's recent recovery from illness. Arbitrator Hilpert denied the grievance because the company had a rational basis for its action.¹²⁰

The typical equalization provision does not guarantee that employees will receive overtime assignments.¹²¹ Only after management determines that overtime is needed does the question arise of which employee should receive the overtime assignment. A well-drafted equalization clause should set forth the procedure to be followed in making that assignment decision. Unfortunately, not all equalization clauses are well-drafted.

Failure to state the period within which overtime must be equalized, for example, almost guarantees a dispute. Inclusion of an equalization provision in the contract shows that the parties intend a fair allocation of overtime opportunities,¹²² but obviously an even distribution cannot always be achieved on a daily or weekly basis.¹²³ Consequently arbitrators have interpreted equalization provisions to require only a relatively equal allocation of overtime opportunities over a reasonable period of time.¹²⁴

Under the typical equalization scheme, employees are charged with refused overtime opportunities. The employer and employee may disagree over whether such charges were proper under the parties' contractual plan.¹²⁵ In *Amax Lead Co.*¹²⁶ Arbitrator Raymond Roberts ruled that the company properly charged the grievant with refused overtime when he was on an excused absence due to illness.¹²⁷ His absence had created the overtime opportunity. Roberts reasoned: "If employees were not charged with refused overtime because the overtime opportunity arose due to their

116. *Washington Mack Trucks, Inc.*, 71 Lab. Arb. (BNA) 412, 413 (1978) (Cushman, Arb.).

117. *Colt Indus.*, 73 Lab. Arb. (BNA) 1087, 1088 (1979) (Belshaw, Arb.).

118. 46 Lab. Arb. (BNA) 641 (1966).

119. *Id.* at 641-42.

120. *Id.* at 644.

121. *E.g.*, *Southern Can Co.*, 68 Lab. Arb. (BNA) 1183, 1189 (1977) (Jedel, Arb.).

122. *Amax Lead Co.*, 74 Lab. Arb. (BNA) 998, 999 (1980) (Roberts, Arb.); *John Deere Dubuque Tractor Works*, 35 Lab. Arb. (BNA) 495 (1960) (Larkin, Arb.).

123. *See, e.g.*, *Washington Mack Trucks, Inc.*, 71 Lab. Arb. (BNA) 412 (1978) (Cushman, Arb.); *Dallas Power Co.*, 49 Lab. Arb. (BNA) 360 (1967) (Ray, Arb.); *Standard Oil Co. (Ind.)*, 28 Lab. Arb. (BNA) 100 (1957) (Doyle, Arb.).

124. Periods held to be reasonable include: one year, *Hercules Powder Co.*, 40 Lab. Arb. (BNA) 526 (1963) (McCoy, Arb.); four months, *North Am. Aviation, Inc.*, 17 Lab. Arb. (BNA) 320 (1951) (Komaroff, Arb.); and one month, *Fruehauf Trailer Co.*, 27 Lab. Arb. (BNA) 834, 835 (1957) (Seligson, Arb.).

125. *See, e.g.*, *Mason & Hanger-Silas Mason Co.*, 69 Lab. Arb. (BNA) 329 (1977) (Goodstein, Arb.).

126. 74 Lab. Arb. (BNA) 998 (1980).

127. *Id.* at 999.

own absence, an unreasonable result would be probable in some instances and penalty or forfeiture to the Company would result through no fault of its own in administering the distribution of overtime."¹²⁸

An equalization scheme may present another set of questions involving an employer's assignment of overtime tasks on the basis of an individual's qualifications to perform the needed tasks.¹²⁹ Management's consideration of qualifications results in unequal distribution of overtime opportunities because employees are not equally able to perform all work.¹³⁰ In *Colt Industries*,¹³¹ Arbitrator William Belshaw enforced the terms of a distribution system even though the company's assignments were motivated by its perceived production needs.¹³² "That was economically sensible, perhaps, but it was also contractually impermissible."¹³³ The evidence indicated that although the employees differed in proficiency and experience, all the employees within the equalization unit could perform the required tasks. The detailed contract provision contained two exceptions to the equal distribution requirement, neither of which was applicable. "While the language does not say that other exceptions . . . were considered, it *certainly* says that some *were*, signifying the opportunity that others *could have been*, but were not embraced. That manifests an intent."¹³⁴ A contrary result would follow, of course, if the equalization provision allowed management to consider employee qualifications when allocating overtime opportunities.¹³⁵

A union may argue that management must train low-overtime employees to perform high-overtime tasks in order to fulfill the contract equalization standard.¹³⁶ However meritorious as a matter of policy, this affirmative obligation should not be imposed by an arbitrator without contractual direction or clear prior understanding to that effect.¹³⁷

A few collective bargaining agreements provide for the distribution of overtime on the basis of seniority.¹³⁸ The arbitrator should not impose a seniority criterion if the contract itself does not,¹³⁹ unless persuasive evidence of an established practice indicates a tacit amendment of the agreement.¹⁴⁰

Management must give employees adequate notice of an overtime assignment. An ambiguous note left at an employee's home¹⁴¹ or a single call to a local pub

128. *Id.* at 1004.

129. *E.g.*, *Norris Indus.*, 62 Lab. Arb. (BNA) 632 (1974) (Jones, Arb.).

130. *E.g.*, *Southwest Potash Corp.*, 30 Lab. Arb. (BNA) 314 (1958) (Beatty, Arb.).

131. 73 Lab. Arb. (BNA) 1087 (1979).

132. *Id.* at 1088.

133. *Id.* at 1090.

134. *Id.* (emphasis in original).

135. *E.g.*, *Washington Mack Trucks, Inc.* 71 Lab. Arb. (BNA) 412 (1978) (Cushman, Arb.); *Social Sec. Admin.*, 69 Lab. Arb. (BNA) 1149 (1977) (Kaplan, Arb.).

136. *E.g.*, *Bridgeport Brass Co.*, 19 Lab. Arb. (BNA) 690, 691 (1952) (Donnelly, Arb.).

137. *Goodyear Aerospace Corp.*, 51 Lab. Arb. (BNA) 344 (1968) (Lehoczy, Arb.).

138. *E.g.*, *Keystone Consol. Indus., Inc.*, 75 Lab. Arb. (BNA) 608 (1980) (Fish, Arb.); *Amtel, Inc.*, 63 Lab. Arb. (BNA) 357 (1974) (Shanker, Arb.); *Kellogg Co.*, 62 Lab. Arb. (BNA) 1217 (1974) (Bourne, Arb.); *see also McCord Corp.*, 38 Lab. Arb. (BNA) 788 (1962) (Sembower, Arb.) (length of service controls premium day assignments when ability to perform and physical fitness are relatively equal).

139. *Precision Rubber Prods. Co.*, 32 Lab. Arb. (BNA) 790 (1959) (Suagee, Arb.).

140. *Monsanto Chem. Co.*, 15 Lab. Arb. (BNA) 589 (1950) (Selekman, Arb.).

141. *Inland Container Corp.*, 74 Lab. Arb. (BNA) 110, 111 (1980) (Boals, Arb.).

frequented by an employee¹⁴² is insufficient. At the very least, management must attempt to locate the employee entitled to perform the overtime work if he is in the plant.¹⁴³ In *Kellogg Co.*,¹⁴⁴ Arbitrator Richard Bourne concluded that the company had used reasonable means to find the employee entitled to receive the overtime opportunity when the foreman checked the locker room and parking lot, and the grievant knew that the overtime opportunity was available.¹⁴⁵ Cases may turn on the precise language used in the agreement, but in the absence of contractual stipulation, management need only use reasonable means to locate the employee who is entitled to the overtime opportunity.

VI. REMEDIES

If the arbitrator determines that management has violated the agreement in the assignment of overtime, he then must address the extraordinarily difficult problem of selecting a remedy. Management's violation, even if made in good faith or as a result of a simple error, warrants some remedy for the injured employee.¹⁴⁶ The agreement itself may specify the remedy for breach of the overtime provisions,¹⁴⁷ but more often the arbitrator is left without express guidance.

The problem of missed overtime has been a perplexing one for arbitrators because each of the possible remedies is flawed. The two primary choices available to the arbitrator are monetary relief and a "make-up" order. Neither remedy is without difficulty. The former may overcompensate the grievant and constitute punitive damages, while the latter may undercompensate him or cause problems for other employees.

Monetary relief, usually in the amount of the premium rate for the number of missed hours, is the more common of the two remedies,¹⁴⁸ but except in unusual circumstances, monetary relief is not the fairer approach. Arbitrators have offered two reasons for ordering monetary relief. The first is that alternative remedies are insufficient to deter future contractual violations because the employer can allow an employee to make up a lost opportunity without incurring any costs in the process.¹⁴⁹ This position mistakes the purpose of arbitral remedies for contractual breaches. Like remedies for breaches of other contracts, arbitral remedies should be purely compensatory and not punitive. In the words of one of the leading contract scholars:

Somewhat surprisingly, our system of contract remedies rejects, for the most part, compulsion of the promisor as a goal. It does not impose criminal penalties on one who refuses

142. *Virginia-Carolina Chem. Co.*, 42 Lab. Arb. (BNA) 237 (1964) (Kesselman, Arb.).

143. *Monsanto Chem. Co.*, 15 Lab. Arb. (BNA) 589 (1950) (Selekman, Arb.).

144. 62 Lab. Arb. (BNA) 1217 (1974).

145. *Id.* at 1218; *see also* *Great Lakes Spring Corp.*, 12 Lab. Arb. (BNA) 779, 780 (1949) (Kelliher, Arb.) (company posted notice of Saturday work and personally notified the grievants).

146. *E.g.*, *Thomas Truck & Caster Co.*, 74 Lab. Arb. (BNA) 1276 (1980) (Cohen, Arb.).

147. *E.g.*, *Sun Petroleum Prods. Co.*, 70 Lab. Arb. (BNA) 300 (1978) (Belkin, Arb.); *Potash Co. of Am.*, 47 Lab. Arb. (BNA) 865 (1966) (Block, Arb.).

148. M. HILL & A. SINICROPI, *REMEDIES IN ARBITRATION* 122-23 (1981).

149. *See, e.g.*, *Donn Prods.*, 70 Lab. Arb. (BNA) 430 (1979) (Siegal, Arb.); *Morton Salt Co.*, 42 Lab. Arb. (BNA) 525 (1964) (Hebert, Arb.).

to perform his promise nor does it generally require him to pay punitive damages. Our system of contract remedies is not directed at *compulsion of promisors to prevent breach*; it is aimed, instead, at *relief to promisees to redress breach*.¹⁵⁰

Absent unusual circumstances the arbitrator's sole objective should be to compensate the grievant fully. To do more would introduce a punitive element that has no place in contractual cases.¹⁵¹ Contrary to some assertions,¹⁵² motive is not relevant to determinations of contractual remedies. In all cases the grievant is entitled to full compensation for the harm suffered, but no more. Whether the breach was in bad faith is irrelevant.

The second reason offered for the monetary remedy also is based on a misinterpretation of contract principles. Some arbitrators have held that the employee is entitled to overtime pay for the missed hours as damages.¹⁵³ This position improperly describes the damages suffered by the employee who misses an overtime assignment. The actual loss is not the money the employee would have earned but the opportunity to earn that money. The difference between the two positions can be illustrated by an example of a simple problem of sales. If A breaches an agreement to sell a car worth \$10,000 to B for \$9,000, B's damages are measured not by the value of the car but by that value less what he would have exchanged for it—\$1,000 rather than \$10,000. Similarly, the grievant in the typical overtime case has lost not the amount of overtime pay but rather the chance to exchange labor for the promised amount. To give the employee the money without requiring him to work for it would be to give him more than he bargained for; it would, in other words, overcompensate him. Monetary relief thus is inappropriate in the normal overtime case because it overcompensates the grievant and imposes a penalty on the employer. In both respects, monetary relief departs from proper principles of contract remedies.

The alternative to a monetary award is a make-up order. Typically, this remedy directs the employer to offer the appropriate amount of overtime to the grievant in the future. The arbitrator should specify that the new offer has to be one the grievant would not normally have received, lest it fail to provide compensation. When overtime is allocated by seniority, for example, the arbitrator might require that the grievant be given the next overtime assignment without regard to seniority.¹⁵⁴ The chief benefits of the make-up remedy are the opposite of the detriments of the monetary remedy; that is, the make-up remedy more accurately compensates the grievant without imposing a penalty on the employer. The make-up remedy is not without difficulties, however, and may not be appropriate for all cases.

In some circumstances, the make-up remedy will not fully compensate the

150. E. FARNSWORTH, *CONTRACTS* 812 (1982) (emphasis in original).

151. Monetary awards have been defended by analogy to back-pay awards in discharge cases, e.g., *Kimberly-Clark Corp.*, 61 Lab. Arb. (BNA) 1094, 1100 (1973) (Fellman, Arb.), but the analogy is false. In the discharge situation there is no available alternative which would make the grievant whole. The lost work can never be retrieved. In the missed overtime case, the grievant can be given an extra overtime opportunity and be made whole.

152. See, e.g., *Menasco Mfg. Co.*, 69 Lab. Arb. (BNA) 759 (1977) (Bergeson, Arb.); *McCall Corp.*, 49 Lab. Arb. (BNA) 933 (1967) (Stouffer, Arb.).

153. See *Hercules Powder Co.*, 40 Lab. Arb. (BNA) 526, 528 (1963) (McCoy, Arb.); *Phillips Chem. Co.*, 17 Lab. Arb. (BNA) 721 (1951) (Emery, Arb.); M. HILL & A. SINICROPI, *supra* note 148, at 123-24.

154. M. HILL & A. SINICROPI, *supra* note 148, at 125-26.

grievant. The employee may no longer be employed by the company, may have left the bargaining unit, may be on lay-off status, or may have transferred to another position for which overtime is not available.¹⁵⁵ Obviously the make-up remedy will not help the grievant in any of these situations and should not be used by the arbitrator. In these cases, monetary relief is preferable.

In other circumstances the make-up remedy might be possible but would not be as convenient for the employee as the original overtime would have been. If that is the case, a make-up order will not provide exact compensation. In *Logan-Long Co.*,¹⁵⁶ for example, the company improperly bypassed a member of the labor pool during a holiday weekend shutdown. Arbitrator William Dolson noted that overtime was not considered desirable at the plant and that senior employees generally welcomed the opportunity to be off a few days.¹⁵⁷ The grievant had requested to work the overtime in question and had the right to do so under the agreement. The arbitrator ordered monetary compensation rather than a make-up remedy, reasoning: "It is possible that an employee denied overtime when he desired to work it . . . might not wish to work it at a later time, particularly in the case where he has already worked a long work week."¹⁵⁸ If so, affording him another opportunity to work overtime "would fall short of making him whole for the loss."¹⁵⁹

Rather than awarding compensation for the unworked overtime, the arbitrator should have tailored the make-up remedy to deal with this concern. He could have granted the grievant the opportunity to select an overtime day to remedy his loss, provided that the work would not otherwise have been offered to him on that day. In this way the employee would have been made virtually whole and management would have received work for the overtime compensation it paid.¹⁶⁰

Any make-up order should specify that the grievant be given an opportunity he would not otherwise have received. Obviously the grievant would receive no compensation by being given the next overtime assignment by arbitral order if he would have received that assignment anyway. This type of preference creates a new and more difficult problem. If one employee is given an out-of-turn overtime assignment, a second employee will be deprived of that assignment.¹⁶¹ Remedy for one breach might cause another. The second breach might not cause a grievance, however, because the union and other employees presumably approve of the arbitrator's objective. If the second employee does object, the arbitrator will have to analyze the situation more carefully.

Two factors relevant to resolving this problem are the time period at issue and the appropriate groups of workers. Some agreements specify that overtime will be

155. *Logan-Long Co.*, 61 Lab. Arb. (BNA) 963, 967 (1973) (Dolson, Arb.).

156. *Id.* at 963.

157. *Id.* at 964.

158. *Id.* at 967.

159. *Id.*

160. *Kaiser Aluminum & Chem. Corp.*, 54 Lab. Arb. (BNA) 613, 617-18 (1970) (Bothwell, Arb.); *Morton Salt Corp.*, 42 Lab. Arb. (BNA) 525 (1964) (Hebert, Arb.).

161. *Kimberly-Clark Corp.*, 61 Lab. Arb. (BNA) 1094-95 (1973) (Fellman, Arb.); *Giant Tiger Super Stores Co.*, 43 Lab. Arb. (BNA) 1243 (1965) (Kates, Arb.); *Morton Salt Co.*, 42 Lab. Arb. (BNA) 525 (1964) (Hebert, Arb.); *John Deere Dubuque Tractor Works*, 35 Lab. Arb. (BNA) 495 (1960) (Larkin, Arb.).

distributed equitably during a certain accounting period. If the contract is silent, an arbitrator may imply a reasonable period for equalization. If the accounting period has not expired by the time the arbitrator renders the award, the make-up remedy should create no difficulty. By means of future assignments, the employer can grant the grievant a special turn and still equalize overtime opportunities by the end of the period. The employee who received the original assignment already will have been charged for it, and the aggrieved employee can be awarded a future overtime opportunity without jeopardizing the contractual rights of other employees. In this situation, make-up relief is the best possible remedy.

Given the length of time it takes to get a case to arbitration, any stated or reasonable accounting period probably will have expired by the time the arbitrator rules. Even so, make-up relief still may be appropriate. For example, if the membership of the overtime unit has remained fairly stable, an extra overtime opportunity for the grievant in the second quarter of the year will compensate for a missed opportunity in the first quarter. The employee who wrongly benefited from the first quarter error suffers no real harm by losing a turn in the second quarter. This remedy may not comply exactly with the contractual objective of equalizing overtime within certain periods, but it accomplishes the general objective of equalization with less damage to other remedial principles than any available alternative.

The make-up remedy may not work well when the relevant group of employees has changed significantly. The make-up remedy still would be preferable if it were possible to create an overtime opportunity especially for the grievant;¹⁶² however, this is rarely possible. The arbitrator can require that the grievant's extra opportunity be taken from the employee who benefited from the original breach rather than from a new or otherwise innocent employee. When the wrongly benefited employee is no longer in the unit, however, or when no one can determine which employee benefited from the breach, make-up relief may not be feasible and a monetary award may be necessary.

Make-up relief may be inappropriate in another situation. If the original assignment of overtime was to an employee outside the equalization unit, an order that the grievant be given the next assignment within the unit will deprive some other member of the unit of a turn. The remedy would come at the expense of an innocent employee. In this situation a monetary award may be the better choice.¹⁶³

It may be possible to construct remedies other than full monetary compensation or make-up. For example, a grievant might be paid at overtime rates for the next appropriate number of hours of regular time work, such as the number of hours wrongfully assigned to another employee. In this way the company receives the worked hours and the employee receives the premium. Under this compromise approach, the employee may lose the extra hours, but on the other hand he does not actually have to work the overtime hours denied. This approach gives the grievant

162. *Morton Salt Co.*, 42 Lab. Arb. (BNA) 525, 531 (1964) (Hebert, Arb.); *American Viscose Corp.*, 38 Lab. Arb. (BNA) 70-71 (1962) (Crawford, Arb.).

163. See M. HILL & A. SINICROPI, *supra* note 148, at 125-26, & nn. 86-92.

only part of his claim, but it provides full compensation for the number of hours actually worked.

In *Southwestern Bell*¹⁶⁴ Arbitrator Helmut Wolff ordered a most unusual remedy when the company wrongly assigned the grievant overtime on the day she was to move her household furnishings. She worked under protest and, as a direct result of her inability to supervise the move, her Victorian couch was ruined. The arbitrator ordered the company to pay her for the loss of her couch!¹⁶⁵

Creative remedies may be required in peculiar circumstances, but normally the choice will be limited to make-up or full monetary relief. Make-up is preferred as long as it can be implemented without depriving the grievant of actual compensation and without taking any rights from an innocent employee. A monetary award is in order if an original assignment was outside the equalization unit or if major changes within the unit make it impossible for a make-up order to remedy the harm without creating a new breach.¹⁶⁶

VII. PREMIUM PAY PROVISIONS

Collective bargaining agreements often specify situations other than overtime when employees must be paid at higher than a regular rate of pay. Most commonly, the work in question is performed outside the normal shifts of work and premium pay is intended to compensate employees for the increased inconvenience.¹⁶⁷ Examples include premiums paid for work on a Saturday,¹⁶⁸ Sunday,¹⁶⁹ or holiday,¹⁷⁰ and on the sixth or seventh¹⁷¹ consecutive day in a week. Other premiums compensate employees for less desirable or more onerous work performed within regularly scheduled hours.¹⁷² Examples include premiums for night shifts¹⁷³ and hazardous work.¹⁷⁴

In resolving disputes of these types, the arbitrator must determine whether the facts of a particular situation trigger the application of a particular premium pay provision.¹⁷⁵ "An arbitrator must proceed on the assumption that the parties mean

164. 61 Lab Arb. (BNA) 202 (1973).

165. *Id.* at 220.

166. M. HILL & A. SINICROPI, *supra* note 148, at 129.

167. *E.g.*, Visitron Corp., 73 Lab. Arb. (BNA) 677, 680 (1979) (Rybolt, Arb.); Economy Steel Constr. Co., 47 Lab. Arb. (BNA) 861, 863 (1966) (Updegraff, Arb.); General Cable Corp., 33 Lab. Arb. (BNA) 327 (1959) (Larson, Arb.); Granite City Steel Co., 9 Lab. Arb. (BNA) 101, 105 (1947) (Hilpert, Arb.).

168. American Optical Corp., 74 Lab. Arb. (BNA) 1195 (1980) (Foster, Arb.); Menasco Mfg. Co., 30 Lab. Arb. (BNA) 465, 466 (1958) (Boles, Arb.); O'Brien Suburban Press, Inc., 21 Lab. Arb. (BNA) 290 (1953) (Donnelly, Arb.).

169. May Dep't Stores Co., 77 Lab. Arb. (BNA) 1030 (1981) (Talarico, Arb.); New York Shipping Ass'n, 20 Lab. Arb. (BNA) 75, 86 (1952) (Hays, Arb.); Merck & Co., 1 Lab. Arb. (BNA) 430, 431 (1946) (Korey, Arb.).

170. Glass Container Mfrs. Inst., 37 Lab. Arb. (BNA) 709 (1961) (Ross, Arb.); York Motor Express Co., 26 Lab. Arb. (BNA) 491 (1956) (Appleby, Arb.); Idaho Mining & Smelting Co., 5 Lab. Arb. (BNA) 7 (1946) (Cheney, Arb.).

171. Walworth Co., 5 Lab. Arb. (BNA) 551 (1946) (Selekman, Arb.); Rainbow Baking Co., 75 Lab. Arb. (BNA) 153 (1980) (Craver, Arb.).

172. Visitron Corp., 73 Lab. Arb. (BNA) 677 (1979) (Rybolt, Arb.) (shift premium); Ideal Corrugated Box Co., 46 Lab. Arb. (BNA) 129 (1965) (Hayes, Arb.); Enterprise Dye Works, Inc., 12 Lab. Arb. (BNA) 960 (1949) (Myers, Arb.).

173. Pennwoven, Inc., 14 Lab. Arb. (BNA) 649 (1950) (Willcox, Arb.); International Harvester Co., 14 Lab. Arb. (BNA) 527 (1950) (Seward, Arb.).

174. Mare Island Naval Shipyard, 76 Lab. Arb. (BNA) 462 (1981) (Aller, Arb.); National Elec. Contractors Ass'n, 63 Lab. Arb. (BNA) 235 (1974) (Jacobs, Arb.).

175. Rohm & Haas Tex., Inc., 81 Lab. Arb. (BNA) 903, 904 (1981) (Nicholas, Arb.) (shift premium).

what they say in the agreement and intended to say what is in the agreement.”¹⁷⁶ In some situations the bargaining history or a consistent practice may provide compelling proof that a purely literal reading of the parties’ contract language would not accurately reflect the parties’ mutual intent. In these extremely rare instances, the arbitrator will interpret the contract to mean what the parties actually intended rather than what they said.

As in other non-disciplinary cases, the union bears the burden of proving the employer breached the agreement.¹⁷⁷ For example, the union must show that the employee was performing work on his sixth or seventh day in the week¹⁷⁸ or that the work in question was hazardous within the meaning of the contract premium pay provision.¹⁷⁹

A. Sixth-Seventh Day and Saturday-Sunday Premiums

The arbitrator’s main task when interpreting extra day or weekend premium pay provisions is to determine the intent of the parties. Once that intention is determined, the arbitrator is bound by their choices, whether he believes them wise or unwise, fair or unfair. Contractual definitions provide the primary guideposts, and the arbitrator therefore must start by reading the language of the contract. At times, evidence of the parties’ bargaining history and practice will clarify their intent. The following decisions illustrate the common problems raised by these premium pay provisions and the ways arbitrators have resolved the resulting grievance disputes.

Arbitrator Paul Barron addressed a claim for sixth day overtime in *Amax Nickel, Inc.*¹⁸⁰ The agreement provided that the workday began at 6:30 a.m. and ended at 6:30 a.m. the next day. The grievant worked his regular night shift on Monday and Tuesday. He then worked overtime on his Wednesday night shift for four hours into the contractually defined Thursday work day, for which he was paid at overtime rates. He was not scheduled for a regular Thursday shift but worked his scheduled night shift on Friday. When he was scheduled for the Saturday night shift, he claimed that it was his sixth day in the workweek, since he had worked during Thursday as defined in the contract.¹⁸¹ Arbitrator Barron denied the grievance, explaining that sixth day premium provisions are intended to compensate an employee for being required to report to work at the plant on six separate occasions. Since the grievant only reported to work on five separate occasions, the premium pay provision was not applicable.¹⁸²

176. Precision Rubber Prods. Co., 32 Lab. Arb. (BNA) 790, 793 (1959) (Suagee, Arb.).

177. National Elec. Contractors Ass’n, 63 Lab. Arb. (BNA) 235, 239 (Jacobs, Arb.); Certain-Teed Prods. Corp., 61 Lab. Arb. (BNA) 689, 691 (1973) (Eaton, Arb.).

178. Armstrong Rubber Co., 17 Lab. Arb. (BNA) 741-42 (1952) (Gorder, Arb.).

179. See Mare Island Naval Shipyard, 76 Lab. Arb. (BNA) 462 (1981) (Aller, Arb.) (no hazardous levels of airborne concentrations as required under the provision for environmental pay); see also Naval Air Rework Facility, 73 Lab. Arb. (BNA) 201 (1979) (Livengood, Arb.) (common conditions not “unusually severe” hazards requiring “environmental pay” under the contract).

180. 79 Lab. Arb. (BNA) 830 (1982).

181. *Id.* at 831.

182. *Id.* at 833.

In *King Soopers, Inc.*¹⁸³ Arbitrator Harry MacLean ruled that the double time premium for working the seventh consecutive day in a week was applicable when the contract defined the normal workweek as Monday through Friday or Tuesday through Saturday and the grievants had worked Monday through Sunday.¹⁸⁴ The company claimed that the workweek had always been Sunday through Saturday but the arbitrator found the past practice inconclusive, and more importantly found that the contract definition of the workweek was clear and controlling. He suggested that if the company had wanted a clarification of the workweek definition, it should have bargained for a change in the contract language.¹⁸⁵

In *Cincinnati Gas & Electric Co.*¹⁸⁶ the parties asked Arbitrator Roland Strasshofer to determine whether employees were entitled to double time pay for time spent on a Sunday travelling to attend a required out-of-state nuclear reactor start-up training program. The agreement required payment at double time for "time worked" on Sunday and required payment at the "regular straight time rate when participating in the training program."¹⁸⁷ Relying on evidence of the parties' detailed discussions and correspondence concerning the training programs, the arbitrator concluded that travel time was not intended to be treated as time worked. The premium rate therefore was inapplicable.¹⁸⁸

Arbitrator Jerome Katz denied a claim for Sunday double time pay in *Alexander's Personnel Providers, Inc.*¹⁸⁹ despite a contract provision requiring payment at the premium rate.¹⁹⁰ When the parties negotiated their agreement, the company's stores were closed on Sundays because of the state's Blue Laws. The company began opening its stores on Sunday after the statute was declared unconstitutional. The arbitrator ruled that the union bore the burden of proving that when the parties agreed to the double time provision, they both knew and intended that it was to apply to the then totally unforeseeable circumstance of regular Sunday openings. Since the union could not meet this burden, the grievance was denied.¹⁹¹

Arbitrator Katz incorrectly substituted his views of a wise policy for the words of the contract. Often parties to a collective agreement agree to provisions that produce unforeseeable results when conditions change. Parties must live with their deal or bargain to change it.¹⁹² A Sunday premium pay provision is intended to compensate employees at enhanced rates of pay for work on a day of rest, which for

183. 79 Lab. Arb. (BNA) 857 (1982).

184. *Id.*

185. *Id.* at 864.

186. 74 Lab. Arb. (BNA) 1042 (1980).

187. *Id.* at 1042-43.

188. *Id.* at 1045.

189. 68 Lab. Arb. (BNA) 249 (1977).

190. *Id.* at 249-50.

191. *Id.* at 253.

192. Arbitrator Bernard Marcus noted in *Scott Paper Co.*, 68 Lab. Arb. (BNA) 838, 841 (1977):

This is not the first and certainly will not be the last grievance which achieves a result, based on interpretation of contract language, which appears to provide an unexpected windfall to one of the parties at the expense of the other. However, the arbitrator is a creature of the contract and may depart from the consequences of contract language only in extremely limited situations.

many constitutes the Sabbath.¹⁹³ Legalization of Sunday sales should not disturb the parties' express understanding of the premium an employer must pay to purchase Sunday work. The employer may not have foreseen a need to assign employees to Sunday work on a regular basis, but when that need arose the agreement set the terms of compensation.

In *American Optical Corp.*¹⁹⁴ the contract provided: "All work on Saturday shall be considered as overtime for which time and one-half will be paid."¹⁹⁵ Arbitrator Howard Foster held that a third shift worker whose shift began at 11 p.m. on Friday was entitled to premium pay for all hours he worked on Saturday. The company had argued that the premium rate should apply only when Saturday was an overtime day or an additional day worked apart from the normal Monday through Friday schedule. The arbitrator rejected that reading, noting that the contract language expressly stated that "all" Saturday work was to be treated as overtime work.¹⁹⁶

Compelling evidence of bargaining history and actual practice over a ten year period led another arbitrator to interpret similar language differently. In *Vlasic Foods, Inc.*¹⁹⁷ Arbitrator Nathan Lipson held that the "evidence strongly suggests that the parties adopted and readopted the . . . language with the understanding that it would be applied in accordance with the Company practice," which was to pay the premium rates only to shifts beginning on Saturday.¹⁹⁸ In general, an arbitrator should take the parties at their word and allow their contract language to control. However, when bargaining history demonstrates with convincing clarity precisely what the parties meant by the language, their true intent must prevail over erroneously chosen words. Without such compelling evidence, the arbitrator simply should read and apply the contract.¹⁹⁹

B. Holiday Premiums

As with other premium pay situations, premium pay for work performed on a holiday may be required in order to discourage employers from scheduling employees on holidays and to compensate employees for the loss of their free holiday time.²⁰⁰ The parties' language must be read logically to determine their intent,²⁰¹ and the bargaining history may be useful when the provision is ambiguous.²⁰² Intention depends more on objective evidence than on subjective or belated desires. In one remarkable case, the employer justified its refusal to pay employees the triple time

193. *Granite City Steel Co.*, 9 Lab. Arb. (BNA) 101, 109 (1947) (Perlstein, Arb., dissenting); *Merck & Co.*, 1 Lab. Arb. (BNA) 430, 434 (1946) (Korey, Arb.).

194. 74 Lab. Arb. (BNA) 1195 (1980) (Foster, Arb.).

195. *Id.* at 1196.

196. *Id.* at 1198.

197. 74 Lab. Arb. (BNA) 1214 (1980).

198. *Id.* at 1217.

199. *May Dep't Stores Co.*, 77 Lab. Arb. (BNA) 1030 (1981) (Talarico, Arb.).

200. See, e.g., *Southern Standard Bag Corp.*, 47 Lab. Arb. (BNA) 26 (1966) (Whyte, Arb.); *Weaver Mfg. Div.*, 39 Lab. Arb. (BNA) 1262, 1264-65 (1962) (Sembower, Arb.); *Kimberly-Clark Corp.*, 12 Lab. Arb. (BNA) 598 (1949) (Jaffe, Arb.); *Eastern Stainless Steel Corp.*, 7 Lab. Arb. (BNA) 267 (1947) (Selekman, Arb.).

201. See *Knox County Comm'rs*, 81 Lab. Arb. (BNA) 774 (1983) (Chandler, Arb.).

202. E.g., *Southern Standard Bag Corp.*, 47 Lab. Arb. (BNA) 26 (1966) (Whyte, Arb.).

rate required by the holiday premium pay provision on the ground that the employer's negotiator had not read the contract carefully before he signed it!²⁰³ The arbitrator properly rejected this disingenuous argument.²⁰⁴

It will not always be clear whether the day in question is in fact a holiday for premium pay purposes under the collective bargaining agreement.²⁰⁵ Bargaining history,²⁰⁶ prior practice,²⁰⁷ and decisions involving pay for unworked holidays²⁰⁸ should be examined to interpret the contract references.

In *Alabama By-Products Corp.*²⁰⁹ Arbitrator H. H. Grooms addressed a claim for premium pay by an employee who had planned to work on his birthday—a holiday under the agreement—but who was unable to do so because he was called to jury duty that week.²¹⁰ The employee was paid jury duty pay for the week under the agreement and straight time pay for his unworked birthday holiday. As a result, the employee lost the opportunity to earn two shifts of pay because he would have received triple time under the contract if he had worked his birthday holiday. While denying the request for monetary relief, the arbitrator exercised his sense of “equity and good conscience” and ordered the company to allow the grievant to designate another day as his birthday.²¹¹ The arbitrator's concern for the employee's unfortunate plight and his devotion to his civic duty are understandable, but it is inevitable that some contract benefits will be affected by fortuitous circumstances. Here, for example, the grievant earned jury duty pay without performing any work for the company. In effect, he received a windfall. Management could not be blamed for the grievant's misfortune, and the agreement provided for only one birthday holiday a year. The arbitrator should have denied the grievance; he had no power to do more than interpret the agreement. By comparison, in *Poe Coal Co.*,²¹² the same arbitrator properly upheld a claim for premium holiday pay when the evidence showed that the company refused to allow the employee to work on his birthday.²¹³ In this instance, the arbitrator correctly ruled that pay was due because the employer's action was taken solely to avoid the contractual holiday pay obligation.²¹⁴

C. Shift Differentials

Arbitrator Lennart Larson distinguished shift differentials from overtime premiums in *General Cable Corp.*:²¹⁵

203. Theodore Mayer & Bros., 62 Lab. Arb. (BNA) 540 (1974) (McIntosh, Arb.).

204. *Id.* at 542.

205. Association of D.C. Liquor Wholesalers, Inc., 75 Lab. Arb. (BNA) 998 (1980) (Oldham, Arb.); Cahokia Downs, Inc., 69 Lab. Arb. (BNA) 282 (1977) (Davis, Arb.); Glass Container Mfrs. Inst., 37 Lab. Arb. (BNA) 709 (1961) (Ross, Arb.).

206. Ionia Gen. Tire, Inc., 72 Lab. Arb. (BNA) 616, 619–20 (1979) (McDonald, Arb.) (language in prior contract changed in negotiations).

207. Yoder Bros., Inc., 69 Lab. Arb. (BNA) 115 (1976) (Ipavec, Arb.).

208. See Abrams & Nolan, *Resolving Holiday Pay Disputes in Labor Arbitration*, 33 CASE W. RES. 380 (1983).

209. 68 Lab. Arb. (BNA) 992 (1977).

210. *Id.*

211. *Id.* at 994.

212. 62 Lab. Arb. (BNA) 240 (1974) (Grooms, Arb.).

213. *Id.*

214. *Id.* at 245.

215. 33 Lab. Arb. (BNA) 327 (1959).

The purpose of shift differentials is to compensate for the inconvenience of being regularly assigned to an afternoon or night shift. A prime purpose of overtime payments is to compensate for long hours, before or after one's regular eight hours. Necessarily, overtime hours cause a day employee to work outside his regular shift. For this he receives a premium rate (time and one-half). He is not entitled to a shift premium for these hours because he does not work them regularly, and he is compensated for the long and irregular hours by the overtime rate.²¹⁶

Thus, in *Visitron Corp.*²¹⁷ when a mechanic who regularly worked the day shift was assigned fill-in work from 7:30 p.m. to 11:30 p.m., he was entitled to overtime pay but not to the shift differential.²¹⁸

Shift differentials compensate employees for the extra burdens of working a regular night shift.²¹⁹ As Arbitrator Bertram Willcox explained in *Pennwoven, Inc.*,²²⁰ shift premiums are established "out of consideration for the inconvenience, and disruption of normal living customs, caused to a worker by having to work on a late shift. A special payment is made, in other words, for sleeping by day and working by night."²²¹

In *Universal Atlas Cement Co.*²²² the contract required a shift differential only for employees regularly working the afternoon and evening shifts. The company incorrectly had paid the shift differential to certain day shift employees for the hours they worked in the afternoon.²²³ When it realized its error, the company corrected its practice and gave the union written notice. Arbitrator Jules Justin denied the union's grievance protesting the change, ruling that the company could correct its mistake and abide by the contractual language.²²⁴ In contrast, Arbitrator Charles Anrod refused to enforce clear contract language in *Great Lakes Carbon Corp.*,²²⁵ which provided that "[a]pplicable shift differentials will be added to holiday pay only when the holiday is actually worked."²²⁶ For nine years, the company had failed to add the differentials to the holiday pay and none of the affected employees had grieved. The union was aware of the practice and allowed it to continue without challenge. Based on this history, the arbitrator denied a grievance seeking the shift differential.²²⁷

Although long-term acceptance of a practice through a series of negotiations may indicate that the union has agreed to a change in the contract, an arbitrator should be very cautious about ignoring a clear contractual promise. Management's prior conduct denying a benefit may simply constitute a series of contract violations. In the

216. *Id.* at 329 (emphasis in original).

217. 73 Lab. Arb. (BNA) 677 (1979) (Rybolt, Arb.).

218. *Id.*

219. *Ideal Corrugated Box Co.*, 46 Lab. Arb. (BNA) 129 (1965) (Hayes, Arb.); *Public Serv. Elec. & Gas Co.*, 2 Lab. Arb. (BNA) 2 (1946) (Gellhorn, Arb.).

220. 14 Lab. Arb. (BNA) 649 (1950).

221. *Id.* at 651.

222. 32 Lab. Arb. (BNA) 999 (1959) (Justin, Arb.).

223. *Id.*

224. *Id.* at 1002.

225. 43 Lab. Arb. (BNA) 1173 (1964).

226. *Id.*

227. *Id.* at 1176.

absence of compelling evidence of a tacit amendment, changes should be made at the bargaining table.

D. *Choice of Premium Provisions*

Now and then there may be some doubt as to which of two premium pay provisions applies in a given situation. The arbitrator may have to look to outside factors in order to resolve the doubt. In *Cleveland Board of Education*²²⁸ two unions representing custodians claimed that the school board wrongly paid employees under the emergency clause time and one-half premium rate instead of the inspection clause double time premium rate for weekend inspection work.²²⁹ The school board argued that the severe winter weather constituted an emergency situation and that the board's action was in accordance with the parties' agreements. The arbitrator sustained the grievance because the calendar dates within which the inspections were to be conducted indicated that the parties had contemplated severe winter weather conditions when they agreed to the inspection clause. His conclusion was buttressed by an established past practice of paying employees for the weekend work in accordance with the inspection clause premium rate and not the emergency clause premium rate.²³⁰

E. *Pyramiding*

At one time the pyramiding of premium pay constituted a major arbitration issue.²³¹ Today, parties customarily prohibit pyramiding.²³² However, the question of what constitutes the prohibited pyramiding remains.²³³

Arbitrator Hiram Lesar in *King-Seeley Thermos Co.*²³⁴ defined pyramiding as "piling on by paying at two different rates for the same hours of work."²³⁵ He offered the following example of pyramiding forbidden by a contract that provided for double time for work on Sunday and time and one-half for work in excess of eight hours: If an employee worked from 11 p.m. Saturday until 11 a.m. Sunday, the last four hours would be overtime since they were in excess of eight hours. "But to pay the employee at a rate of three and one-half times (double for Sunday and time and one-half for overtime) his regular rate of pay would be pyramiding. So he gets the larger of the two rates, double time."²³⁶

In *Teledyne Monarch Rubber*,²³⁷ an employee was paid at a double time rate for

228. 81 Lab. Arb. (BNA) 387 (1983) (Abrams, Arb.).

229. *Id.* at 338-39.

230. *Id.* at 389; see also *Utility Appliance Corp.*, 20 Lab. Arb. (BNA) 775 (1953) (Cheney, Arb.) (work on Saturday holiday compensated at holiday double time rate, not Saturday time and one-half rate).

231. See, e.g., *York Motor Express Co.*, 26 Lab. Arb. (BNA) 491 (1956) (Appleby, Arb.).

232. E.g., *King-Seeley Thermos Co.*, 61 Lab. Arb. (BNA) 544 (1973) (Lesar, Arb.).

233. *Marx Toys*, 68 Lab. Arb. (BNA) 1206, 1207-8 (1977) (Kreimer, Arb.); *Transparent Package Co.*, 24 Lab. Arb. (BNA) 247 (1955) (Kelliher, Arb.).

234. 61 Lab. Arb. (BNA) 544 (1973).

235. *Id.* at 546.

236. *Id.*; see *Safeway Stores*, 45 Lab. Arb. (BNA) 1163 (1965) (Atkins, Arb.); *Hooker Chem. Corp.*, 42 Lab. Arb. (BNA) 191 (1964) (Russell, Arb.).

237. 61 Lab. Arb. (BNA) 1052 (1973) (Baldwin, Arb.).

his work from 3 p.m. until 11 p.m. on Sunday. He then worked his regular 7 a.m. to 3 p.m. shift on Monday.²³⁸ The employee grieved, claiming that he was entitled to pay at a time and one-half rate for the Monday hours since the contract provided for that premium for all hours worked in excess of eight hours in "any 24-hour period." Management argued that this would constitute pyramiding expressly forbidden by the contract. Arbitrator Ben Baldwin sustained the grievance because the employee was not attempting "to collect overtime pay for the same hours worked under two or more sections of the contract."²³⁹

VIII. CONCLUSION

To resolve disputes involving overtime and premium pay provisions, the arbitrator must marshal all of his interpretive talents. Principles for the resolution of these types of disputes are well established, but the task of adjudication is neither easy nor mechanical.

In the absence of contractual restriction, management has a broad range of discretion in the assignment of overtime. No one is entitled to an overtime assignment unless the contract so provides. Management may seek productive efficiency by deciding whether overtime will be worked, how many employees are needed for the task, how long the job should last, and who will receive the assignment. Contract terms may overrule efficiency goals, however. For example, when the parties have agreed to a procedure for the allocation of available overtime by reserving that work to employees in certain classifications or departments, the arbitrator must hold management to its bargain.

To remedy violations of overtime provisions, especially in the difficult area of overtime equalization, the arbitrator must make the aggrieved employee whole without depriving other employees of their rights and, as far as possible, without imposing a penalty on the employer. Usually a make-up order can achieve these objectives, but in some circumstances a monetary award will be required.

Premium pay provisions also present a myriad of problems in interpretation and application. The arbitrator must ascertain the parties' intent and determine whether the facts of the case mandate the payment of the premium rate.

When the parties agree that employee time will be paid at a premium, they recognize that disputes will arise regarding the scope and applicability of their bargain. As a result, labor and management entrust to their chosen neutral the final and binding resolution of those disputes. They anticipate that the arbitrator will apply the generally understood standards of dispute resolution in this area in a manner that will resolve the controversy consistently with their agreement. The arbitrator must fulfill those legitimate expectations.

²³⁸. *Id.*

²³⁹. *Id.* at 1053.